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Oct. 28. 7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~380.~~ 176

ARTHUR B. MEEKER, PLAINTIFF IN ERROR,

vs.

JAMES LEE AND JACOB STEVER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 10, 1870.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, judge of the United States circuit court for the seventh circuit, and the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, judges of said circuit court, on Friday, the tenth day of June, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

WILLIAM H. BRADLEY, *Clerk.*

JAMES LEE AND JACOB STEVER
vs.
ARTHUR B. MEEKER. } 9021. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that, on the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, came James Lee and Jacob Stever, plaintiffs, by Messrs. Thompson & Bishop, their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons against Arthur B. Meeker, defendant; and also at the same time filed their bond for costs in said entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

In the circuit court of the United States, northern district of Illinois.

UNITED STATES OF AMERICA,
Nor. Dis't of Illinois, ss:

JAMES LEE AND JACOB STEVER, COPARTners, &c.,
vs.
ARTHUR B. MEEKER. } Assumpsit. Dam's $4000.

3 Please issue summons in the above-entitled cause in a plea of trespass on the case on promises. Damages $4,000.

THOMPSON & BISHOP,
Atty's for Pl'ff.

W'M H. BRADLEY, *Clerk.*

(Endorsed:) Filed Sept, 28, 1869. W'm H. Bradley, cl'k.

Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, nor. dis't of Illinois, October term, A. D. 1869.

JAMES LEE AND JACOB STEVER
vs.
A. B. MEEKER. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all

costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them, hereby agree
4 and stipulate that execution may issue against my property for any costs taxed against them.

Dated this day of September, A. D. 1869.

ANDREW BROWN.

(Endorsed:) Filed Sept. 28th, A. D. 1869. W'm H. Bradley, clerk.

On the same day, to wit, the twenty-eighth day of September, A. D. 1869, a writ of summons, issued out of said clerk's office, against said defendant in said entitled cause, which said writ, together with the return of the marshal thereto, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Arthur B. Meeker, if he shall be found in your district, to be and appear before our judges of our
5 circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto James Lee and Jacob Stever, copartners, &c., in a plea of trespass on the case upon promises, to their damage, as they allege, of four thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 28th day of September, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 94th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, A. C. Campbell my true and lawful deputy to
6 execute the annexed writ, (James Lee et al. vs. Arthur B. Meeker,) and to make true return thereon according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal of the Northern District of Illinois.

I have, this thirteenth day of September, A. D. 1869, executed the annexed writ, (James Lee et al. vs. Arthur B. Meeker,) by reading the same to, and in the presence and hearing of Arthur B. Meeker therein named.

B. H. CAMPBELL,
United States Marshal of the northern district of Illinois.
By A. C. CAMPBELL,
Special Deputy.

A. C. Campbell, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this 30th day of September, A. D. 1869.

P. A. HOYNE,
U. S. Com. N. D. Ill.

On this day, to wit, the 4th day of October, A. D. 1869, came
7 said plaintiffs by their attorneys, and filed in said clerk's office their declaration against said defendant in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the northern district of Illinois. To the October term, A. D, 1869.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

1. James Lee and Jacob Stever, late copartners, doing business under the name, firm, and style of Lee & Stever, who are citizens of the State of Ohio, by Thompson & Bishop, their attorneys, complain of Arthur B. Meeker, who is a citizen of the State of Illinois, and a resident within the northern district of Illinois, defendant herein, who was summoned, &c., of a plea of trespass on the case on promises. For that whereas heretofore to wit, on the first day of November, A. D. 1866, at Chicago, to wit, at said northern district of Illinois, in consideration that
8 the said plaintiffs, at the special instance and request of the said defendants would ship and consign to the said defendant divers goods and chattels, to wit, sixty-one tons of Massillon pig-iron No 1, of great value, to wit, of the value of three thousand six hundred and sixty dollars of lawful money of the United States, to be received by the said defendant and to be sold and disposed of by the said defendant for and on account of the said plaintiffs for a reasonable reward to the said defendant in that behalf, he, the said defendant, undertook and then and there faithfully promised the said plaintiffs to receive and to endeavor to sell and dispose of said goods and chattels for the said plaintiffs, and to render to the said plaintiffs a true and just account of said goods and chattels and of the moneys arising from the sale thereof, whenever the said defendant should be thereunto requested; and, although the said plaintiffs, confiding
9 in the said promise and undertaking of the said defendant did afterwards, to wit, on the day and year aforesaid, at said northern district of Illinois, ship and consign the said goods and chattels to the said defendant, for the purpose aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving and craftily and subtly intending to deceive and defraud the said plaintiffs in this behalf, neglected to receive the said goods and chattels, and did not endeavor to sell or dispose of the same, and conducted himself so negligently in and about said goods and chattels that the same were wholly lost to these plaintiffs, to wit, at said northern district of Illinois.

2. And for that whereas also, heretofore, to wit, on the first day of October, A. D. 1866, at the northern district of Illinois aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendant, would send and consign to the said defend-
10 ant divers goods and chattels of the said plaintiffs of great value, to wit, of the value of three thousand five hundred dollars, in order that the said defendant, might sell and dispose of the same for the said plaintiffs for commission and reward to the said defendant in that behalf, he, the said defendant, undertook, and then and there faithfully

promised the said plaintiffs to pay the freight and charges on said goods and chattels and to store and take care of and endeavor to sell and dispose of said goods and chattels for the said plaintiffs; and, although the said plaintiffs did, afterwards, to wit, on the day and year last aforesaid, and on divers other days and times afterwards and before the commencement of this suit, ship and consign to the said defendant the said goods and chattels for the purposes aforesaid, to wit, at said district; yet the said defendant, not regarding his said promise and undertaking, but contriving, &c., did not pay said freight and charges, whereby and in consequence of which the said goods and chattels were afterwards, to wit, on the first day of March, A. D. 1867, at said district, sold
11 for charges and freight, and were wholly lost to said plaintiffs, to wit, at said northern district of Illinois.

3. And for that whereas also, afterwards, to wit, on the 22d day of November, A. D. 1866, at the northern district of Illinois aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendant, had sent and consigned to the said defendant divers other goods and chattels, to wit, sixty-one tons of Massillon pig-iron No. 1, of great value, to wit, of the value of four thousand dollars, in order that the said defendant might sell and dispose of the same for the said plaintiffs for commission and reward to the said defendant in that behalf, he, the said defendant, undertook, and then and there faithfully promised the said plaintiffs to pay the freight and charges on said goods and chattles, and to endeavor to sell and dispose of said goods and chattles; yet the said defendant, not regarding his said promise and undertaking, but contriving, &c., did not pay the
12 freight and charges on said goods and chattels, whereby and in consequence of which, the said goods and chattels were sold to pay said freight and charges, and were wholly lost to the said plaintiffs, to wit, at said northern district of Illinois.

4. And for that whereas also, the said defendant, before the making of his said promise and undertaking hereinafter next mentioned, was a commission merchant, and the business of a commission merchant used, exercised, and carried on in the city of Chicago, to wit, at said northern district of Illinois; and thereupon heretofore, to wit, on the 22d day of November, A. D. 1866, at the northern district of Illinois aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendant, had sent and consigned by the Pittsburg, Fort Wayne & Chicago Railway, to the said defendant at the said city of Chicago, certain goods and chattels, to wit, 61 tons pig iron No. 1, of the said plaintiffs, of great value, to wit, of the value of four thousand dollars, to be by the said defendant taken and received from
13 said railway, and to be sold and disposed of for a certain reward or commission to the said defendant in that behalf, he, the said defendant, undertook, and then and there faithfully promised the said plaintiffs that he, the said defendant, would take and receive the said goods and chattels, and pay the freight and charges thereon; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiffs in this behalf, did not nor would take and receive the said goods and chattels from said railway, nor pay the said freight and charges thereon, but, on the contrary thereof, he, the said defendant, so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the said defendant in that behalf, the said goods and chattels being of the value aforesaid, to wit, on the day and

year aforesaid, became and were wholly lost to the said plaintiffs, to wit, at the northern district of Illinois, aforesaid.

14 5. And for that whereas also, heretofore, to wit, on the first day of June, A. D. 1866, at Chicago, to wit, at the northern district of Illinois, in consideration that the plaintiffs, at the special instance and request of said defendant, had sent and consigned to the said defendant divers goods and chattels, to wit, 500 tons of Massillon pig-iron of great value, to wit, of the value of thirty thousand dollars, in order that the said defendant might sell and dispose of the same for the said plaintiffs for commission and reward to the said defendant in that behalf, he, the said defendant, undertook, and then and there faithfully promised the said plaintiffs to pay and advance the freights and charges on said goods and chattels, and to store and take care of the said goods and chattels, and to endeavor to sell and dispose of the said goods and chattels for and on the account of the said plaintiffs, and to render a just and reasonable account of the sales thereof to the said plaintiffs, and to keep the said plaintiffs duly advised as to the

15 situation of said goods and chattels; and, although a reasonable time for the said defendant to render such account as aforesaid has long since elapsed, yet the said defendant, not regarding his said promise and undertaking, but contriving, &c., hath not paid and advanced the freights and charges on said goods and chattels, and hath not stored and taken care of said goods and chattels, and hath not rendered a just and reasonable account of the sales thereof to the said plaintiffs, and hath not kept the said plaintiffs duly advised as to the situation of said goods and chattels, but hath hitherto wholly neglected and refused so to do, to wit, at said northern district of Illinois.

6. For that whereas also, the said defendant, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was a commission merchant, and the business of a commission merchant then followed and carried on, to wit, at said northern district of Illinois; and thereupon heretofore, to wit, on the 22d day of

16 November, A. D. 1866, at said district, in consideration that the said plaintiffs, at the special instance and request of the said defendant, had then and there consigned to the said defendant certain goods and chattels of the said plaintiffs, to wit, one hundred tons of Massillon pig-iron, of great value, to wit, of the value of five thousand dollars, to be received, stored, taken care of, and sold by the said defendant for a certain commission to be therefor paid by the said plaintiffs to the said defendant, he, the said defendant, undertook, and then and there faithfully promised the said plaintiffs to receive, store, and take care of said goods and chattels, and to pay the usual freights and charges on the same; yet the said defendant, not regarding his said promise and undertaking, but contriving, &c., did not nor would receive, store, and take care of said goods and chattels, nor pay the usual freights and charges therein, but, on the contrary thereof, he, the said defendant, after the making of his said promise and undertaking, to wit, on the day and year aforesaid, at the district aforesaid, so carelessly and negligently behaved and conducted himself with respect to

17 the said goods and chattels, that by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf, the said goods and chattels being of the value aforesaid, became and were, and still are, wholly lost to the said plaintiffs, to wit, at the northern district of Illinois, aforesaid.

And whereas also, the said defendant afterwards, to wit, on the first

day of September, A. D. 1869, at the northern district of Illinois, was indebted to the said plaintiffs in a large sum of money, to wit, the sum of four thousand dollars for so much money by the said defendant before that time had and received to and for the use of the said plaintiffs, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, at said district, undertook, and then and there faithfully promised the said plaintiffs to pay them said sum of money when he should be thereunto afterwards requested; yet the said defendant, not regarding his said promise and undertaking, but contriving, &c., hath not as yet paid said sum of money, or any part thereof, to the said plaintiffs, although often requested so to do, but to pay the same hath wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiffs of four thousand dollars; and therefore they bring suit, &c.

18

THOMPSON & BISHOP,
Pl'ffs' Att'ys.

(Endorsed:) Filed Oct. 4, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 13th day of October, A. D. 1869, came said defendant, by his attorneys, and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

19 In the United States circuit court for the northern dist. of Ill., October term, A. D. 1869.

ARTHUR B. MEEKER
ads.
JACOB STEVER AND JAMES LEE. } In assumpsit.

And the said defendant, Meeker, by Bentley and Hart, his attorneys, comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise in manner and form as the plaintiffs have in their declaration and the several counts thereof complained against him; and of this he puts himself upon the country, etc.

By BENTLEY AND HART,
Defendant's Attorneys.

And the plaintiffs do the like.

By THOMPSON & BISHOP,
Att'ys for Pl'ffs.

(Endorsed:) Filed Oct. 13, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 25th day of February, A. D. 1870, came said plaintiffs, by their attorneys, and filed in said clerk's office their amendments to their declaration in said entitled cause, which said amendments are in the words and figures following, to wit:

20

Amendments to declaration.

In the circuit court of the United States for the northern district of Illinois.

JAMES LEE AND JACOB STEVER, COPARTNERS, &c. *vs.* ARTHUR B. MEEKER. } Amendments to declaration.

In 1st count strike out all words after the words "to wit" in last line but one on 1st page, and before the words "of lawful money" in 3d line of 2d page, and insert "ninety-two tons and 345 pounds Massillon Foundry pig-iron, of great value, to wit, of the value of six thousand dollars."

In 3d count strike out words commencing with "sixty-one" and ending with dollars, and insert "sixty-five tons number one Massillon Foundry pig-iron and thirty tons number two Massillon Foundry pig-iron, of great value, to wit, of the value of six thousand dollars."

21 In fourth count strike out words commencing "61 tons" and ending with "dollars," and insert "ninety-three tons number one Massillon Foundry pig-iron. of great value, to wit, of the value of six thousand dollars."

In ad damnum, strike out "four" an insert "six."

THOMPSON & BISHOP,
Att'ys for Pl'ffs.

(Endorsed:) Filed Feb'y 25, 1870. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 16th day of May, in the adjourned May term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Jury empanneled.

JAMES LEE AND JACOB STEVER *vs.* ARTHUR B. MEEKER. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined, thereupon come a jury of good and lawful men, to wit, Andrew M.
22 Hitt, John Gift, Silas Best, Samuel Birdsall, jr., Thatcher Blake, Henry W. Loomis, John A. Flagg, James Irving, Nathan W. Brown, James S. Taggart, R. D. Dodge, and John E. Clarkson, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 17th day of May, in the adjourned May term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Leave to seal verdict.

JAMES LEE AND JACOB STEVER *vs.* ARTHUR B. MEEKER. } Assumpsit.

Now, come again the parties, by their attorneys, and now come also

the jury in this behalf empannel'ed and sworn, and after hearing the concluding evidence, and the arguments of counsel, and receiving
23 the instructions of the court, the jury retired to consider of their verdict; and, by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to the clerk, and disperse.

Afterwards, to wit, on the 18th day of May, A. D. 1870, in said term of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Verdict & motion for new trial.

JAMES LEE AND JACOB STEVER
vs.
ARTHUR B. MEEKER. } Assumpsit.

The jury in this behalf, empannel'ed and sworn this day, returned into court their sealed verdict, wherein they say, We, the jury, find the issues for the plaintiffs, and assess their damages to the sum of three thousand eight hundred and sixty-four dollars and fifty-one cents. And thereupon the defendant, by his attorney, moves the court for a new trial herein.

24 On this day, to wit, the 10th day of June, A. D. 1870, came said defendant, by his attorneys, and filed in said clerk's office his grounds for a new trial in said entitled cause, which read in the words and figures following, to wit:

Grounds for new trial.

In the circuit court of the United States.

JAMES LEE & JACOB STEVER
vs.
ARTHUR B. MEEKER.

And now comes the defendant, by Bentley & Hart, his attorneys, & files the following grounds of his motion for a new trial of the above-entitled cause:

1st. The verdict was contrary to the evidence.
2d. The verdict was contrary to law.
3d. The damages awarded to the plaintiff are excessive.

BENTLEY & HART,
Defendant's Att'ys.

(Endorsed:) Filed June 10, 1870. W'm H. Bradley, cl'k.

25 Afterwards, to wit, the 10th day of June, A. D. 1870, in said May term of said court in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Motion overrul'd & judg't rendered.

JAMES LEE AND JACOB STEVER
vs.
ARTHUR B. MEEKER. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be

heard the motion of the defendant heretofore entered herein for a new trial of this cause; and, after hearing the arguments of counsel the court overruled said motion. It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the said sum of three thousand eight hundred and sixty-four dollars and fifty-one cents, their damages so as aforesaid assessed, together with their costs and charges by them about their suit in this behalf expended, amounting to the sum of sixty dollars and fifty cents, and that they have execution therefor.

26 On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

27 BILL OF EXCEPTION.

Circuit court of the United States, northern district of Illinois.

JAMES LEE & JACOB STEVER
vs.
ARTHUR B. MEEKER.

Testimony of L. H. Preston.

Be it remembered that on the trial of this cause the plaintiffs, in support of the issue on their part, called LENOX H. PRESTON as a witness, who testified that he had been in the coal and iron business for four or five years. That Massil'on pig-iron sold, in the latter part of the year 1866 and early part of the year 1867, quality No. 1, for from $54 50 to $58 per ton. No. 2, for from $52 50 to $54 per ton. After that it was lower—in May 1867, $54 for No. 1. Some was sold in July, 1867, for $52 50. Could not state what it sold for after that.

Dep. of J. K. Merwin.

The plaintiffs, in further support of the issue on their part, read in evidence the deposition of JOSEPH K. MERWIN, who testified that he was secretary and book-keeper of the Volcano Furnace Company, of Massil'on, Ohio. That he knew of the shipment and consignment by the plaintiffs to the defendant in the year 1866, of 763 tons of iron—of which 603 tons were No. 1 Massil'on pig-iron, and 160 tons were
28 No. 2 of same. That 453 tons of No. 1 were shipped by canal from Massil'on to Cleveland, thence by Lake to Chicago; 150 tons, No. 1, and all of No. 2, 160 tons, were shipped by the Pittsburgh and Fort Wayne Railroad from Massil'on to Chicago. Cars No. 787 was shipped Oct. 18, 1866; No's 1556 & 1328, Oct. 19; No. 594, Oct. 23, and No's 1481, 1589, & 1177, Oct. 30. 1866. That the defendant was duly notified by letter as each shipment was made and a bill of lading sent. The shipments and receipts of iron were acknowledged by the defendant in the following accounts of sale:

Acc'ts of sale.

Exhibit number one, referred to in my direct examination, November 1st, 1869.

JOSEPH K. MERWIN.

No. 1.—Account sales by Arthur B. Meeker of Massil'on pig-iron.

Received per lake, , 186 . For account Messrs. Lee and Steever, Massil'on, Ohio.

1866.			
June.	Sold $226\frac{330}{2240}$ tons No. 1—54.....		12,236 05
July			
Aug.			
	Last of lot.		

CHARGES.

	Canal freights.....	473 78	
	Lake insurance.....	115 72	
	Q. C. & Co. ch's in Cleveland.....	171	
29	Lake freight, 90 tons, 1 68.....	151 20	
	" " 138 " 2	276	
July 9.	Currency per express.....	5,000	
Aug. 1.	N. Y. d'ft. sight.....	4,000	
	exchange on do.....	4	
	Interest on ac. 10 %.....	75	
	Gov't tax " sales $\frac{1}{10}$ %.....	12 25	
	Commissions, dockage, & handling, 5 %..	611 80	
			10,890 75
	Nett proceeds to cr.....		$1,345 30

E. & O. E.
Chicago, August 20th, 1866.

A. B. MEEKER.
BROWN.

Statement of Massil'on iron, received via lake & rail.

For % Messrs. Lee & Stever.		For ac. Messrs. Rhodes, Card & Co.	
No. 1.	169 $\frac{1736}{}$		64 $\frac{1966}{}$
" 1.	53 $\frac{1960}{}$		65 $\frac{1955}{}$
" 1.	150		43 $\frac{2072}{}$
	373 $\frac{1456}{}$		174 $\frac{1513}{}$
Sold	136 $\frac{1385}{}$		108
On hand	237 $\frac{71}{}$		66 $\frac{1513}{}$
No. 2.			
Rec'd	110		
Sold	82 $\frac{620}{}$		
On hand	27 $\frac{1620}{}$		

CHICAGO, *Dec. 1st*, 1866.

30 Exhibit number two, referred to in my direct examination, November 1st, 1869.

JOS. K. MERWIN.

No. 2.—Account sales by Arthur B. Meeker of Massil'on pig-iron.

Received per lake and rail, 186 . For account Messrs. Lee and Stever, Massil'on, Ohio.

	Tons.	Cwt.	Grade.	Price.			
1866.							
	48	1,765	1	55	.....	2,683 33	
Aug.	60	350	1	56	.....	3,368 75	
Sept.	27	1,510	1	59	.....	1,632 77	
Oct.							
Nov.	82	620	2	52 25	.....	4,298 95	
							11,983 80

Total tons:
136 1385 No. 1.
82 620 " 2.

CHARGES.

Sep. 1.	Canal freight, 170 tons.....	353 26	
	Rhodes, Card & Co. ch'g's.....	127 50	
	Lake insurance.....	96 05	
	" freight.....	361 25	
18.	S't d'ft on N. Y. 3,000 00 & ex. 3 00.....	3,003	
Oct. 5.	Canal f't, 55 tons.....	114 29	
	Rhodes, Curd & Co., ch'g's.....	41 25	
	Lake insurance.....	45 37	
	R. R. freight, 26 cars, 55.....	1,430	
	Gov't tax on sales $\frac{1}{10}$ %.....	11 98	
	Commissions, dockage, & handling, 5 %..	599 19	
	Lake freight, 55 tons.....	177 10	
			6,360 24
	Nett proceeds to c'r Messrs. Lee & Steever.		$5,623 56

E. & O. E.
Chicago, November 30th, 1866.

A. B. MEEKER.
BROWN.

31 Exhibit number three, referred to in my direct examination, November 1st, 1869.

JOS. K. MERWIN.

Account sales by Arthur B. Meeker of Massil'on pig iron.

Received per lake and rail , 186 . For account Messrs. Lee and Stever, Massil'on, Ohio.

Sold.	Tons.	Cwt.	Grade.	Price.		
Dec.						
Jan'y.	20		No. 1.	57	1,140	
Feb'y.	33	1,420	1.	55 50.....	1,866 70	
Mch.	15		2.	53.....	795	
Apl.	34	1,610	2.	51 50.....	1,788	
						5,589 70
Total....	53	1,420	No. 1.			
	49	1,610	2.			

Last of No. 2.

CHARGES.

Dec.	Railroad freight, 50 tons, No. 2.....	275		
	Gov't tax, $\frac{1}{10}$ %.....	5 59		
	Commissions, dockage, & handling, 5 %..	279 46		
				560 05
	Nett proceeds to c'r Messrs. Lee & Stever.			$5,029 65

E & O. E.
Chicago, May 1st, 1867.

A. B. MEEKER.
BROWN.

CHICAGO, *May 1st*, 1867.

Messrs. Lee and Stever, Massil'on, Ohio, in account current with A. B. Meeker.

DR.

18 .				
Dec. 6.	To c'y per express.....	3,000		
1867.				
Jan'y 3.	" N. Y. d'f't & exchange.....	2,002		
Feb'y 21.	" " " & "	7,007		
May 1.	" interest on a'c to date	296		
				12,305

CR.

1866.				
Nov. 30.	By net proceeds, sales No. 2	5,623 56		
1867.				
May 1.	" " " " " 3	5,029 65		
				10,653 21
	Bal. Dr			$1,651 79

32 Exhibit number four, referred to in my direct examination, Nov. 1st, 1869.

JOSEPH K. MERWIN.

No. 4.—Account sales by Arthur B. Meeker of Massil'on pig-iron.

Received per lake and rail , 186 . For account Messrs. Lee & Stever, Massil'on, Ohio.

May.	Sold 10 gr. tons. No. 1, 52.....	520		
June. } July. }	5 " " " 1, 51.....	255		
Aug.	20 " " " 1, 50.....	1,000		
Sept.	20 " " " 1, 45 50.....	910		
Oct.				
Nov.	67 " " " 45.....	3,015		
	122			5,700

CHARGES.

Gov't tax	5 70	
Refunded for 50 tons sold as No. 1	200	
Commissions, 5 %	285	
		490 70
Nett proceeds to c'r Messrs. Lee & Stever.		$5,209 30

E. & O. E.
Chicago, Nov. 1st, 1869.

A. B. MEEKER.
BROWN.

The witness further testified that he knew of no specific agreement between the plaintiffs and defendant as to payment of freight on one part and commissions on the other. That he knows defendant
33 paid freight on the receipt of the iron, according to his account of sales, and from the same source that he charged commissions.
That defendant has not accounted for the whole of the iron. That the amount for which he has not accounted is 92 tons and 345 pounds, as appears by the said several accounts of sales. Cannot state when that particular amount was shipped, except as appears from the following letter of the defendant:

Let'er of def't.

Exhibit number five, referred to in my direct examination, November 1st, 1869.

JOSEPH K. MERWIN.

[Coal and pig-iron. Buffalo, 2 Commercial wharf; St. Louis, 1140 Main st.]

OFFICE OF A. B. MEEKER,
7 North Market st., Chicago, Nov. 19, 1867.

Messrs. LEE & STEVER, *Massil'on, Ohio:*

GENTLEMEN: I have y'r favor of the 12th inst., & noted. The last of your iron went last week. It was sold before, but we could not get cars to ship it. There is 6 cars of your iron yet in hands of R. R. Co., which they refused to deliver. I told Mr. Lee about it, & I think we may have to replevin the iron, as they refused to deliver it on payment of freight. If I cannot do better, I will put the matter in my attorney's hands. Mr. Lee may have forgotten the case.
34 The co. notified us of the iron being received, & we sent for it twice, but they couldn't deliver it. When they were ready to deliver it, they demanded demurrage for cars, which I refused to pay. They unloaded the iron in an unsafe place, & part of it was stolen. I was ready to pay freight, but demanded the full quantity.
Y'rs t'uly,

A. B. MEEKER.

I may want 50 tons cheap No. 2. Have you got it? What shall I sell for? I could probably get $43 on cars here.

M.

As to the value of the iron, No. 1 of the quality shipped was worth

in Chicago, from September to December, inclusive, 1866, from $58 to $59. And at the same time, No. 2, was worth from $52 25 to $55. The only advice or information from the defendant as to shipments is contained in letter No. 5, the defendant having refused or neglected answering any letters whatever since the letter above set forth. As the agent and book-keeper of the plaintiffs, I have written to the defendant three or four times since Nov. 19, 1867, and have failed to get any response whatever. As agent and book-keeper of the plaintiffs, have had entire charge of their accounts from the time they commenced business in 1865 to the present time, and am familiar with their business,
35 and particularly that the iron unaccounted for was 64 tons of No. 1, and 28 tons of No. 2 iron. My knowledge of the price of pig-iron in Chicago, in the fall of 1866, is derived from the accounts of sales furnished by the defendant, marked No. 2. My only means of knowing whether the iron arrived in Chicago, is said account of sales. I state upon my oath that the first notice that ever came into the plaintiffs' office, is the letter of defendant, marked No. 5, and dated Nov. 19, 1867.

Dep. of Ja's Lee.

The plaintiffs also read in evidence the deposition of JAMES LEE, who testified that he is one of the plaintiffs; that he knew of the shipment of pig-iron by plaintiffs to defendant in 1866. Is unable to give the amounts except as they appear on the books, which show 763 tons of unequal portions of Nos. 1 and 2. Said iron was weighed, shipped, and billed by said witness Merwin. Witness saw said iron while being weighed and shipped by Ohio canal and lakes, and by the Chicago, Fort Wayne and Pittsburgh Railroad. Said iron was consigned to said defendant to be sold by him on commission, for account and use of the plaintiffs, under an agreement and understanding that defendant should
36 advance freights and sell the iron for a commission of two and one-half per centum. As to the freight, it was to be paid on receipt of said iron by the defendant. Defendant has not accounted for all the iron consigned to him under said agreement. The amount of iron consigned, according to account of sales and the books of plaintiffs, amounts to 92 tons and 345 pounds. The No. 1 was worth from $58 to $59 per ton at Chicago, from September to December, 1866. Cannot state how and when the iron was sent, nor where the same was received when it arrived in Chicago. I was in Chicago in March, 1867, and had conversation with the defendant, in which the defendant advised this plaintiff that the defendant had a misunderstanding with the railroad company in regard to the unloading of a portion of said iron, but that said misunderstanding could be soon arranged with Mr. McCullough, the superintendent of said road. In September, 1867, witness was in Chicago, and had another conversation with the defendant in regard to the iron unaccounted for, when the defendant said he had not effected a settlement with said railroad company, and if he did not get a
37 settlement he would sue the railroad company by the first of January, 1868. On the 19th of November, 1867, defendant wrote plaintiffs a letter, which letter and said conversations are all the advice and information, so far as witness knows, received by the plaintiffs from the defendant, excepting late in the spring of 1869, when witness had another conversation with the defendant at Chicago, in which the defendant urged that a suit be brought against said railroad company by plaintiffs, to which witness would not consent. The plaintiffs have

made repeated efforts by letter to effect adjustment with the defendant, to none of which have plaintiffs been able to get any response. Witness did not see iron weighed or shipped, but saw portions of it weighed and shipped. It was all weighed, loaded, shipped, and billed by Merwin. All agreements and understandings between plaintiffs and defendant were verbal. Witness knows of the value of the iron from said accounts of sales. Have no other means of knowing the price than I have stated. Do not know when said iron arrived in Chicago.
38 All advices and information ever received from defendant were verbal excepting said accounts of sale and letter.

Dep. of J. Stever.

The plaintiff then offered in evidence the deposition of JACOB STEVER, who testified that he is one of the plaintiffs; a manufacturer of pig-iron at Massil'on, Ohio; knows of shipping & consignment of pig-iron to defendant in 1866. Saw defendant at Massil'on in spring of 1866, & made an agreement with him to ship pig-iron to him on commission; in accordance with which, we shipped and consigned to defendant 763 tons Nos. 1 and 2. Agreement with defendant was made by myself. He was to take our iron, make advances, and sell it on commission & pay freights. As to defendant's commission, my best recollection is, he was to charge customary commission, two and one-half per cent. From account of sales I find that defendant has charged us with freight on all consignments made under our arrangement. From examination of our accounts I find that defendant is indebted to us for iron consigned to sell on commission for us, and for which he has not accounted. My recollection is, that at Chicago, in February,
39 1867, I had a conversation with the defendant in reference to our iron, in which defendant referred to a difficulty with the railroad company, as to the place where the iron was to be unloaded; that he wanted the iron unloaded at one place. and it was unloaded at another, and that defendant refused to receive it, claiming that the railroad company had violated their contracts to unload iron where defendant wanted it. On the 19th November, 1867, the defendant wrote to us & sent an account of sales (No. 5.) I find that in his accounts rendered we are charged with the freights on all of the iron we shipped. About Nov. 23, 1868, had a conversation with defendant at his office in Chicago, in which he said on the ensuing 1st of January he would settle with us. In January, 1869, again called at defendant's office when he promised to settle our account by the first day of next April, 1869, which he has neglected and refused to do. Have written repeatedly to defendant to get a settlement, but the defendant has not answered.

And thereupon the plaintiff rested his case.

40 *Testimony of W. M. Olcott.*

And the defendant, to maintain the issue on his part, called, as a witness, WILLIAM M. OLCOTT, who, being duly sworn, testified as follows:

That he was in the employ of the defendant in 1866 and 1867. The defendant received a notice from the Pittsburgh and Fort Wayne Railroad Company of the arrival of this iron. The notice was sent by a boy. The defendant directed the boy to have the iron shipped to the Archer-road yard; at that time the defendant had a yard up there; this yard was connected by switches with the Alton and Saint Louis railroad track, and that was connected with the Pittsburgh & Fort

Wayne Railroad. Directions had been previously given by the defendant to have the iron sent to that yard, and it went all right in accordance with such directions. I think such directions had been given a good many times; that is my recollection now. It was usual that when the iron came in the winter time to have it sent up to that yard. I have seen the collector of the Pittsburgh and Fort Wayne Railroad in the office of the defendant, collecting freight and switching bills at
41 the same time. There was a switch, I think. It was the Alton road that did the switching. The Pittsburgh and Fort Wayne cars run over this Alton-road switch. They were in the habit of doing it. This iron was not sent up to the Archer-road yard. I went to the office of the Pittsburgh and Fort Wayne Railroad *office* by the direction of the defendant to enquire why the iron had not been sent up. They said they hadn't sent; that there was demurrage to be paid on it before it could be touched. They said the demurrage *for was* keeping the cars in the depot; they did not give any reason why they had not sent the cars up to the Archer-road yard. It was four or five days after the notice was received that I went up to enquire about it. I went a second time, I should judge, about four or five days after the first time. The defendant was anxious to know where the iron was, and he sent me a second time. He gave me a check, I think, the second time, to pay the freight on the iron. I took the check. Previously the freights
42 had been paid at defendant's office; but now I took a check up, asked for the iron, & offered the freights. They refused to deliver the iron until the demurrage was paid. The defendant sent his teamster with his team for the iron after I had been up. The boy came with the notice of the arrival of the iron in 1866, in the month of October. The boy's name was George Stokes. He was about fifteen years old. Mr. Meeker did not offer to pay him the freights. He brought the notice that the iron had arrived, notifying Mr. Meeker to go and receive it; that was the substance of the notice. He left the notice with Mr. Meeker. Mr. Meeker signed a receipt for the notice. I do say that I have seen Mr. Meeker pay the freights to the Pittsburgh and Fort Wayne Railroad Company at his office for iron that he had received. It was previous to the time of this notice. Railway freights are usually paid at the railway office. I have paid freight on property consigned to Mr. Meeker at the railway office. My impression is that the Chicago and Alton Railway Company took the cars from the Fort Wayne
43 Road to the Archer-road yard. I never paid any attention as to which railroad company did the work. The company that did the work charged for the switching. The Pittsburgh & Fort Wayne Railroad Company always added the switching to the freight—switching so much; freight so much. Mr. Meeker gave me the check to pay freights on five or six cars. Meeker had been in the habit of receiving freight over the Fort Wayne Road by way of this switch; this had continued for sometime. It was continued after this and before. I believe the Railroad Company claimed that they hadn't received any notice to send the iron to the Archer-road yard. I know the notice was sent by the messenger who brought the notice of the arrival of the iron; and I know that the notice to ship to the Archer-road yard was previously sent by the messenger and worded as this message was. The same notice was sent by messengers in the same way before.

Testimony.—P. Talty.

The defendant, in further support of the issue on his part, called

PATRICK TALTY as a witness, who, being duly sworn, testified as follows:

44 That he was a teamster for the defendant in the fall of 1866. I was engaged hauling iron from the depots, and to the depots, and to various parts of the city; I was sent, in the fall of 1866, by the defendant's foreman, to the Pittsburgh and Fort Wayne depot for Massil'on pig-iron; I took a check with me to pay the freight; also a notice that the iron had arrived. I presented the check to Mr. Glover, the cashier of the Pittsburgh and Fort Wayne Railroad Company. He said it was thrown in the ditch or some other place on the south branch of the river; I came back and reported that the iron wan't there. I think it was Mr. Brady who said the iron was dumped in the ditch; I had the number of the cars, and I thought the cars might be in & I would hunt them up; I couldn't find one of them there, & I enquired of the men. There was nobody there that could give any account of them. I then asked Mr. Brady for the iron, & he said it was dumped into the ditch. I couldn't fix the time when I went for the iron; I saw Mr. Glover there & handed the checks to him, & he said he hadn't the
45 iron; I couldn't say whether this was in October, November, or December. I gave the check back to the foreman. I didn't look any further after the iron.

Testimony of Meeker.

The defendant, then, in further support of the issue on his part, himself testified as follows:

I am the defendant in this suit. My business is coal and pig-iron, & was the same in 1866. The plaintiffs at that time were manufacturers of pig-iron at Massil'on, Ohio. They consigned iron to me to sell on their account, at a commission of five per cent.; that included dockage and all. The iron was shipped part by canal from Massil'on to Cleveland, and then shipped on vessels to Chicago, and part came by rail direct from Massil'on, over the Pittsburgh and Fort Wayne Railroad. We sold iron for the plaintiffs three or four years. I rendered them several accounts of sales. The last one was on Nov. 19, 1867. That is the account of sales annexed to Mr. Merwin's deposition. I enclosed that account in a letter which accompanied it. The letter attached to Mr. Merwin's deposition is the one. I never received any answer to that letter. No objection was ever made to that account. The last
46 sale was mentioned in that account of the iron I had on hand for the plaintiffs. The last account is the closing account of all the iron we had for the plaintiffs. A reference is made in that letter to six cars of iron not yet received. That iron was shipped, as they stated, by the Fort Wayne Road, & consigned to us at Chicago. I received notice of the arrival of the iron from the office of the Pittsburgh & Fort Wayne Railroad Company, through a messenger. It was a printed form of notice, with the number of the cars filled up. I ordered the iron to be shipped to the Archer-road yard, which was up on the south branch, on the St. Louis and Alton Road, which is a common track on the south branch for all the roads. I had been in the habit of having iron and coal delivered at this yard. The custom of all the roads is to deliver stuff out on the south branch, we paying charges. This was the custom of the Pittsburgh and Fort Wayne Road the same as others; all we did was to pay the additional switching charges. This was the general custom with the Pittsburgh and Fort Wayne Railroad. With

the Fort Wayne Road the charges for switching were sent in
47 with the freight bills. They would send in the bills & put in the additional charge for switching. I had one yard on the main river, at the foot of Market street, connected with the Northwestern Road, and on the south branch we had a yard at the Archer road. We get in cars of any road there; the Pittsburgh and Fort Wayne, Michigan Southern, they would always send their cars there for the purpose of taking freight in or out; it is a common track for the twelve different roads. The Chicago and Alton Road had a contract with all the roads, allowing them to send their engines and cars at certain hours to the different yards and warehouses on the south branch, some two or three hundred in number. It was a general custom with all the yards and packing houses. This custom has prevailed ever since I knew anything about business in Chicago. I ordered that messenger who brought the notice of the arrival of these cars to send the cars to the Archer-road yard. It is always done through the messengers. I had given the same directions before to other boys delivering like notices to me. The railroad companies have acted upon directions given to these boys
48 in several instances—in all instances to my recollection. I never had any trouble before about the iron being switched, or the coal. The iron was not left at the Archer-road yard. I sent word to my man in charge of the Archer-road yard that there were six cars of iron to be sent up there, giving the numbers of the cars; and the report came down the next day, or the next but one, that the iron had not reached there; & I then sent Mr Olcott, the witness who has testified, to find out about it. He came back and reported that the iron hadn't gone up. I sent him again, & he reported that they hadn't sent the iron up, and demanded demurrage for the detention of the cars. This may have been eight or ten days after I received the first notice. I then sent up a teamster with a check to pay the freight & demand the iron. He returned with the report that he couldn't get the iron, & I then sent up another man, & he reported that the iron had been thrown into the ditch up on the south branch. I never received the iron. I think one of the plaintiffs, Mr. Lee, was here in January, 1867, about sixty or ninety days afterwards. I told Mr. Lee what we had done, & that we thought we had done our duty; that we had sent for the iron
49 several times, & they refused to deliver it, & finally made a claim for demurrage, which we refused to pay, & they had thrown the iron in the ditch; that I thought the company was liable, and that we had done our duty in the premises. Mr. Lee gave us no directions with regard to taking steps against the company. I related the circumstances fully to Mr. Lee. The plaintiffs were both here several times; as we didn't want the iron, having plenty of time, supposing it would be safe in the railroad company's hands, we did not do anything about it, only at times I would see Mr. McCullough, the general superintendent of the Pittsburgh and Fort Wayne Railroad, and he promised when he came out to have the thing looked up. I had a conversation with Mr. Lee here in 1869, before the commencement of this suit. He wanted to settle for the iron. I told him I couldn't do anything about it; I had seen Mr. McCullough, & he kept promising & promising, every time that he came to Chicago, that he would send word to get his general freight agent to fix the thing up. I told him he had better sue the railroad company; we could prove we had done our part.
50 He said it wouldn't do for him to sue; that they were doing a large business in Massil'on, & they wouldn't dare to sue; they would make it too hot for them—wouldn't give them cars—& he wanted

me to sue them. This letter of 19th Nov. was written long after my first interview with Mr. Lee, & I never received any answer to that letter. In Nov., 1867, the No. 1 iron was worth from $45 to $46 a ton, delivered. In rendering the account of sales, we charged up the freight, & we made a check for the amount, & held it for a long time. They requested an account of sales. We were advancing money all the time, & I supposed of course we would have to pay that freight, and it was charged in the account; that is, the freight on these six cars. It was never paid, and that is a credit back to them, as we never received the iron. We never received the sixty tons. We closed out the last of the plaintiffs' iron in November, 1867—about a year after the sixty tons was said to have arrived in the city. We were having a large quantity of this iron; it was a slow sale, & we sold as rapidly as we could. My impression is that all these six car-loads of iron came together. I think the notices for
51 the six cases all came together. We may have hauled one car-load away that came at the same time that these six cars did; we may have hauled some to the other yard, or to some foundry where we had sold. All our iron did not go to the Archer-road yard. I never paid the freight on these six cars, or tendered it, except I sent the check for it, as I have stated once, by Mr. Olcott, and once by the teamster; possibly twice. I have not the check. I saw a part of the iron, said to be the same iron, afterwards on Michigan avenue, part in an alley and part in a vacant lot, and in Wight & Dunton's care. I never brought any suit about this iron. I think I sent the check by the teamster four or five days after the receipt of the notice. We pay the freights at our office. That is the custom with us. We may have paid some freights in 1866 at the Pittsburgh & Fort Wayne Railroad office. I think we kept part of the iron received from these plaintiffs, part at each yard. The iron was in the open air—not in any building. There was a fence about part of the yard at the Archer road; cannot say what sort of a fence; not any fence about the other yard. We had a watchman
52 there all the time at the Market-street yard. I don't think we had one at the Archer-road yard; the man who had charge of that yard slept over the office. When I first heard of the claim for demurrage I sent up & demanded the iron. I think I ascertained the amount of the charge for demurrage from the teamster that I sent up. I understood the demurrage was $150. I never enquired how many days of demurrage was charged; I never enquired of the railroad company when the cars arrived. When I learned of this charge for demurrage I don't think I did write to the plaintiffs about it; I don't think I asked any instructions of the plaintiffs in November or December. I think I did the next month, in January. I refer to the conversation with Mr. Lee. I think it was early in January; it may have been in February. When I wrote the letter Nov. 19, 1867, I did not know the iron was not then in the hands of the railroad company. I looked upon Wight & Dunton, to whom it was sent for storage, as the agents of the railroad company. They are agents, I believe, of the Pittsburgh and Fort Wayne
53 Railroad Company; they are storage and warehouse men. They told me that the railroad had sent to them a quantity of iron consigned to me. I knew when the iron was advertised for sale for charges. My clerk called my attention to it. I think I saw it advertised for sale. I did not call the plaintiffs' attention to it. When Mr. Lee came to see me—he came to see about iron—wanted money advances all the time on iron. He was anxious to have us take more iron. We may have got a great many letters from the plaintiffs requesting us to dispose of the

iron and account for it. It was a slow sale. I can't recollect how long our conversation lasted, whether five minutes or two hours. I told him the circumstances connected with the iron, and why I wrote this letter explaining the circumstances was to refer to the affair, inclosing our account of sales of all the iron, and, so closing up, give a rehash of the whole matter. I don't know whether I said in the letter that the company could not or would not deliver the iron; it may have been intended for would not. I can say that I sent my check to pay the freight on the iron within ten days after the iron was received. We sent two
54 teamsters and one clerk. We were to charge five per cent. commissions on sales, including dockage, advancing and guaranteeing the sales; never charged less than five per cent. The accounts of sales show our commissions. No objections were ever made to any of these accounts. We may have had 10,000 tons of iron on hand in fall of 1866, part on commission, and part owned by me, and for sale on my own account.

Testimony of W. L. Brown.

And the defendant, in further support of the issue on his part, called as a witness WILLIAM L. BROWN, who, being duly sworn, testified:

That he is a book-keeper for the defendant, and has been since 1865; that he knew of freight bills having been paid at the office of the defendant after the property had been delivered in several instances. The present state of the account between the plaintiffs and defendant is a balance due the defendant of $1,112 49; that is, after crediting back to Lee and Stever the item of $330, charged to them for the freight on these six car-loads of iron. This balance due from Lee and Stever is for advances of money, commissions on the sales of iron for them, &c.
55 And thereupon the defendant rested his case.

Testimony of J. P. Brady.

And the plaintiff, in further support of the issue on his part, called as a witness JOSEPH P. BRADY, who, being duly sworn, testified:

That he is freight agent of the Pittsburgh & Fort Wayne Railroad Company, and has been such for nine years and five months; has charge of all the freights the delivery of them. The six cars in dispute arrived here October 22d, 23d, and 24th, and November 2d. Cars No. 787 arrived Oct. 22d; Nos. 1328, Oct. 24; Nos. 594, Oct. 25; and Nos. 1481, 1589, & 1177, Nov. 2, 1866. There was a car of iron that was delivered to the defendant, which came in the same way and from the same source as these six cars. That car arrived Oct. 25th; it was delivered November 26th. Within twenty-four hours after the arrival of these cars the defendant had notice of their arrival, and to come and pay his freight at the depot. I did not receive any notice from the defendant in reference to the delivery of that freight. I do not know of any notice
56 being received. These cars remained at the place where they arrived for near a month. During that time there was nothing to prevent the consignee from receiving that freight. I have got a copy of the notice that has been used on the road ever since I have been agent. I know that this is a copy of the notice that was sent to Mr. Meeker. I know it because it is the only notice we ever sent out. I did not see the notice sent to Mr. Meeker. I should say one thing, that, since that notice was served, there is a little thing struck out. This is not the same notice we had four or five years ago. Since that time the

road has been leased by the Pennsylvania Central Railroad; but it is the kind of form used, except that road struck out, and "Pennsylvania R. R. Co. lessee," put in. I don't recollect anything of the kind that the teamster testified to about being told that the iron had been dumped into the ditch. If anything of that kind was said, it must have been thirty days after the arrival of the iron, when it was put on the ground. We put it on the ground near our transfer-house. On the 1st of March, 1867, we stored it with Wight & Dunton, who are storage merchants for several roads.

57 The blank notice was here offered in evidence by the plaintiffs' counsel, to which objection was made by the defendant's counsel, and the objection was overruled by the court; to which overruling the defendant's counsel then and there excepted.

The notice is in words and figures as follows:

Blank notice.

50.

Pittsburgh, Fort Wayne, and Chicago Railway, Pennsylvania R. R. Co., lessee.

CHICAGO STATION, , 18 .

M

The following goods have arrived at this station, consigned to you:

From station. Manifest No. . Car No.
Charges, $.

The above-named goods will remain here at your risk, subject to a charge for storage, after 24 hours, and to be sold to pay charges if not delivered. If not called for by you personally, they will only be delivered upon presentation of a written order, as below. Charges payable in all cases before removal of property from the depot.

J. P. BRADY, *Agent.*

Agent Chicago Station.

58 P., F. W. & C. R'Y, PENN'A R. R. Co., LESSEE:

Please deliver the above-named goods to , who is authorized to receipt for the same in my name.

☞ Agents will file this order with receipt for the freight.

The notices were sent by a messenger boy, whose business is to deliver the notices. He has no authority to act for the company with regard to receiving freights or anything else. I didn't send the notices. The messenger boy made them out. We repose the responsibility of making out the notices with the messenger boy. He had authority to bring back a notice if it was written; it was a mere matter of accommodation. I don't think he has authority to bring back a notice where to deliver the iron. I think his authority stops when he has delivered the

notice. If I had got notice from Mr. Meeker to send the cars to the Archer-road yard, I would have stopped the cars until the freight and switching were paid. I have known of cases where freight has been delivered, & then the bills for the freight sent in. This is a
59 special arrangement between the cashier & the consignee. We use the track of the Chicago & Alton Road to deliver stuff when the switching charges are paid. We delivered six car-loads of iron to Wight & Dunton from near our transfer station. It had been laying out there about three months before we delivered it to Wight & Dunton. We did not weigh the iron, and don't know how many tons there were.

Testimony of S. J. Glover.

And the plaintiffs, in further support of the issue on their part, called as a witness S. J. GLOVER, who, being duly sworn, testified:

That he is cashier of the Pittsburgh and Fort Wayne Railroad Company. My business is to receive the money for the freights. I am the only authorized agent to receive these freights; all the others are responsible to me. I remember about these six cars of iron. The freight was never paid by Mr. Meeker. It was finally paid by Wight & Dunton, when we sent the iron to them. They advanced the charges. No *freight* was ever tendered to me for the freight by Mr. Meeker until after there was a claim for demurrage. The claim for demurrage was not made until long after the usual custom to put on demurrage. It
60 is customary to pay all the freights at my office, unless there is some special arrangements with the parties to the contrary. The company recognize hardly any exceptions. It is the rule of the company that all freight shall be paid at the office before any freight is delivered. There has only been one or two or very few exceptions, and that only where there is a special arrangement made between me and all harm—a matter of honor. There was no special arrangement with Mr. Meeker at that time. I received no notice whatever directing this iron to be sent anywhere until after the demurrage was put on. I don't think, at the time this iron arrived, I had ever sent a freight bill to the defendant's office. To the best of my recollection there was none sent. I don't recollect any such conversation as that testified to by the teamster, that he brought a check to my office, & I said there was no iron there. Mr. Meeker's check, at the time he sent it in the fall of 1866, would have been received if there had been no dispute about this demurrage. The rule is to let the cars remain twenty-four hours before we charge demurrage. The rule is indicated in the notice. That
61 is the rule. We sometimes give them a few days' margin.

Testimony of Adam Holliday.

And the plaintiffs, in further support of the issue on their part, called ADAM HOLLIDAY as a witness, who, being duly sworn, testified:

That he is assistant freight agent of the Pittsburgh & Fort Wayne Railroad, and have been about five years. I recollect the six cars of iron. They arrived in October, 1866, and were sent to the Madison and Van Buren street yards, that being the track that we delivered freight on from the cars. They remained there until the fore part of November, and then they were sent to the upper yard at 18th street. There was nothing in the way of delivery but presentment of bill from the cashier's office, showing payment of freight, and the iron would have

been delivered. Some of the cars remained there for six or seven days before they were sent to the other yard at 18th street. No one came for the iron while I was there. I was not there regularly. I am at Madison street most of the time. No teamster or anybody else came for the iron while I was there.

Testimony of Tho's Wight.

And the plaintiffs, in further support of the issue on their part,
62 called THOMAS WIGHT as a witness, who, being duly sworn, testified:

That his firm was Wight & Dunton, and that their business was storage and commission. We received, about the first of March, 1867, some iron from the Pittsburgh, Fort Wayne & Chicago Railroad Company. I called on Mr. Meeker to see if he would take it on his yard, and give us warehouse receipts, subject to the settlement of the difficulty. I can't give the language of his reply, but he didn't concede to it. Afterwards we had to move it from our lot, and I again went to Mr. Meeker, & proposed to let him take it, if he would pay the charges on it. He declined to do that also. I had several conversations with Mr. Meeker about the iron. I don't know that I did in regard to the sale at the time it was made; but that we should sell it for the charges. It was sold Sept. 14, 1868. We only received between forty and fifty tons.

Testimony of Meeker.

And the defendant, in further support of the issue on his part, further testified as follows:

When I became president of the Chicago Iron Company, I
63 sent word to Mr. Glover that it was inconvenient to pay bills every day; that, as a matter of convenience to us, I would be glad to have the bills paid, & send them up every Monday. He said he would do that; but, as far as my own bills were concerned, they were sent in every day. This arrangement was made with the Iron Company in 1868.

Which was all the testimony on either side; and thereupon the court charged the jury as follows:

Charge to jury.

GENTLEMEN OF THE JURY: The question in this case involves a consideration of the duties which a factor or commission merchant owes to his principal or employer.

There seems to be no difference between counsel as to the general rule of law applicable to this class of cases, & defining the liability of this class of dealers. The rule, as usually stated, is, that a factor or commission merchant is liable, for the property entrusted to him, to the same degree of diligence that an ordinarily prudent business man would take of his own property.

There is very little explanation needed for so clear & plain a
64 proposition. It commends itself to you & each of you in the light of your own knowledge of the manner in which prudent men do business, & you are to apply the rule in this case in the light of the evidence, & in the light of your own experience and observation of the manner in which men of prudence do transact their own business.

It is also the duty of a person, thus entrusted with the property of another, to provide a safe & convenient place of storage for it during the time that it remains on his hands. This, of course, is but a natural deduction from the rule which I have stated already. Not that the factor or commission man is necessarily holden as an insurer for every loss which may happen or occur to the property; but he is liable to such an extent as that if a loss does occur, the burden of proof to show how it occurred, & that it did not occur through his negligence, is thrown upon him.

I make this explanation, gentlemen, principally with reference to the question as to the defendant's liability upon the 32 tons of iron, which have been discussed before you in the testimony & in the arguments of counsel.

65 The plaintiffs claim that the defendant has not accounted for the proceeds of 92 tons, in all, of iron which was shipped from Massil'on, Ohio, to the defendant at this place, to be sold for the account of the plaintiffs. It is claimed that the proof shows that this quantity of 92 tons was shipped, & that 32 tons of this 92 tons were actually received by the defendant into his possession, & that he has failed to account for the proceeds.

The answer on the part of the defendant is, so far as this 32 tons of iron is concerned, that, on or about the 19th day of November, 1867, he rendered an account of sales to the plaintiffs, in which he purported to account for all the iron belonging to them, which he had received on commissions, & that, there being no evidence that this account of sales was ever disputed, no exception having been taken to it, no objection raised, no correspondence being had showing that the plaintiffs dissented from the correctness of this account, that the plaintiff is bound by it, that is to say, that he is estopped in the language of the law at this late day from setting up the incorrectness of the account then rendered.

66 If you shall believe, gentlemen of the jury, that there has been no dissent from the correctness of this account, that the plaintiff' received this account and acquiesced in its statements, & have not objected to its correctness, or found fault with it, then the court instructs you that the law will presume, & does presume, that the plaintiffs have acquiesced in the correctness of the accounts from their silence. If you believe, under the testimony, that the plaintiffs have remained silent, & have found no fault, & made no objection, then the conclusion I have indicated would follow. There is some conflict of evidence, however, in regard to this matter, which you must pass upon. I now go to the main subject-matter, which has engrossed your attention during the progress of the trial, & that is the consideration of the six car-loads of iron, which were shipped by the plaintiffs to the defendant in the month of October, 1866, & arrived at Chicago, consigned to the defendant, between the 22d of October & the 2d of November, 1866.

67 There are but few, if any, disputed facts between the parties in reference to this matter. The facts which are undisputed seem to be these:

The defendant had two places of business; two yards where he received & stored the goods which he was selling; one of which was located upon the main branch of the Chicago River, near Market st., & the other upon the south branch near Archer road. When the notice boy or errand boy from the freight office of the Pittsburgh & Fort Wayne Railroad came to the office of the defendant with the notice of the arrival of these cars, the defendant stated to the boy that he wished

these car loads of iron sent to his Archar-road yard. The evidence discloses the fact, that the Pittsburgh & Fort Wayne Railroad Company, who was the carrier of this iron from Massil'on to Chicago, had connection, not by their own track, but by means of the track of the Alton & St. Louis Road, with this Archer-road yard. That is to say, they had such arrangements that, by paying for the switching & extra expense of running cars from their depot to this Archer-road yard, the cars could be delivered in bulk at the Archer-road yard of the defendant & unloaded there.

68 The evidence seems to be unquestioned that they had previously delivered iron in this manner, & also other freight, & that they did so subsequently. The important question, then, in reference to this branch of the case is, Was the railroad company notified properly of this wish on the part of the defendant to have this iron delivered at his Archer-road yard. He sent merely a verbal message by the notice boy. I do not think that for the purpose of carrying this message this notice boy was the agent of the railroad company, but that he was for this purpose merely the agent of the defendant, & if he failed to deliver the message properly, the consequences of that failure are upon the defendant rather than upon the plaintiffs, who were in no way directly connected with it. It was the privilege of the defendant to send a notice of this kind or a request of this kind to the railroad company. He had the right to select any person as the messenger whom he chose to entrust with the message & for whom he chose to be responsible—towards his employers—I mean. He chose to select this boy. There is no evidence that this message was ever delivered to the officers or agents of the railroad at this place; on the contrary, whatever evidence there is upon that subject tends to show

69 that it was not delivered. He notified his agent at the yard that he might expect these six cars there within a short time. In due course of business & within a day or two, Mr. Meeker receives notice from the yard that these six cars, so expected, had not been delivered at the yard. He then, within a few days or a short time, sends a messenger to the railroad depot to make inquiries in regard to the matter, & is informed that there is a charge upon the cars for demurrage, & that they could not be delivered until this demurrage had been paid. Instead of paying this demurrage, or taking measures to have the matter so explained as to get it released at once, the defendant allows the iron to remain in the hands of the railroad company, & although he subsequently sent his teamster after it & sent a check, yet he only sent a check for the amount of the freight & *and* did not include this demurrage in the check. The result was that the iron was not delivered to his teamster, & there is no evidence that he at any time repeated the request to have the iron sent by cars to the Archer-road yard.

The only evidence in regard to any request to the railroad company to have the iron sent to the Archer-road yard, is the request

70 made to the notice boy; nor is there any evidence that he attempted any explaination to the agents of the railroad of the manner in which he had sent forward this notice, the manner in which it might possibly have been miscarried, or not delivered properly, or that he attempted, by explaination, to obtain a deduction of this claim for demurrage. But on the claims being set up & on the refusal on the part of the railroad company to deliver the iron upon the payment of the freight alone, without the demurrage, he suffers the iron to remain in their hands, to be unloaded upon their depot grounds; subsequently to be delivered by them into the hands of a warehouse man in the city

who was in the business of making advances upon property, & suffered it to remain in the hands of these warehousemen until it was finally sold for charges. The question, then, upon these indisputed facts is, What is the liability of the defendant. I will, however, state further, in the same connection, that there is some evidence that, after this difference arose between the railroad company and the defendant, in reference to this matter of demurrage and delivery of iron, one
71 of the plaintiffs was in this city, somewhere from 60 to 90 days succeeding this difference, & a verbal explanation was given to Mr. Lee, the plaintiff, in regard to the difference between Mr. Meeker, his agent, & the railroad co. in regard to this iron—those six car-loads of iron. It is claimed, on the part of the defendant, that he has discharged his duty, when he had merely explained this matter to his principals & stated to them the situation of affairs between himself and the R. R. Co. If you shall believe, from the testimony, that, on receiving this statement, the plaintiffs assumed the subsequent control of the subject-matter & attempted or assumed the negotiations & management of the difficulty with regard to the iron, with the R. R. Co., that would of course release the defendant. If you shall believe, I say, from the testimony, that the plaintiffs stepped in, or assumed to step in at that time & took charge of the difficulty with the R. R. Co. from that time forward, that would release the defendant from further responsibility in looking after the matter; but if you shall believe, from the evidence, that the plaintiff still left the matter in the hands of the defend-
72 ant, & still treated him as in control of the business, so far as their interests were concerned in reference to this iron, you will then, under all the circumstances, be justified in further inquiring whether the defendant, under the circumstances, was guilty of negligence in regard to the manner in which he treated this matter of demurrage & the matter of obtaining the possession of this iron. He was the agent of the plaintiffs here, to receive this iron & pay the freight upon and sell it. The matter of having the iron delivered at the Archer-road yard, instead of having it delivered at the depot & from there transported by teams to the Archer-road yard, or to such other place as the defendant might provide, was a matter about which he might consult his own convenience. It was his duty to see that the iron was received and properly taken care of, for the benefit of the plaintiffs. He had no right to suffer a mere difference which grew up between him & the R. R. Co. to allow the entire property to be lost. It was his duty to either apprise his principals at once of the embarrassment which had arisen, & turn the whole matter over to them, upon the exact
73 statement of facts, or else to work out the solution of the difficulty himself. There seems to be no direct evidence that he turned the whole matter over to the plaintiffs; but on the contrary, the letter accompanying this account, delivered on the 19th of Nov., 1867, one year after the transaction, is a significant item of evidence on this question. He writes, "There is six car loads of your iron, yet in the hands of the R. R. Co. which they refuse to deliver. I told Mr. Lee about it & I think we may have to replevin the iron, as they refuse to deliver it on the payment of the freight. If I cannot do better, I will put the matter in my attorney's hands. Mr. Lee may have forgotten it." Then he goes on & states facts still further.

You will then see that, up to this time—a year after the difficulty had arisen—after the balance of the iron had been closed out, that Mr. Meeker, the defendant, talks, in his correspondence with the plaintiffs, about putting this matter in his attorney's hands, as though he still

treated it as under his control—a matter that he was still negotiating & which he considered himself responsible to his principals for.
74 That, taken in connection with the rest of the testimony bearing upon the case, will give you much light, probably, upon the manner in which this subject has been treated by the defendant, from the time of the initiation of the difficulty between himself & the R. R. Co. up to this time.

And now, in reference to the conclusion which you are to come to, you are the judges of the fact. The defendant here is charged with negligence, & our courts have said that negligence is a question of fact, to be determined by the jury, in view of all the circumstances. You are to determine, then, whether, under the circumstances, Mr. Meeker was as vigilant in regard to it—to this property, whether he took such pains to rescue it from the peril in which it was placed of being sold for those charges, as a prudent man would have taken with his own property. It is for you to say whether a prudent man would have suffered a difference of a few days in the demurrage upon these cars, to have prevented him from adjusting this matter in some way so as to obtain possession of this property & use it for its value. You will have no difficulty, I think, in solving the matter of negligence in the light of the tes-
75 timony & in the light of the rules which have been laid down to you in regard to the o'ligations which a factor or agent owes to his principal. He must treat the property as though it were his own; he must look after it as vigilantly as though it were his own.

By Mr. STORRS. I would like to suggest to the court that our view of the law is that an objection made to that account, if it be true, as the account stated, must be made within a reasonable time.

By the COURT. That is undoubtedly true, that an objection made to an account stated between parties—principals & agents—must be made within a reasonable time.

It is for you (the jury) to say whether any objection was raised, & if any was raised whether it was raised within a reasonable time; those are questions of fact for you to pass upon.

With reference also to the price of this iron, if you shall ever come to the question of damages, you will bear in mind that there is some conflict of testimony there in regard to price, although that will re-
76 solve itself mainly, into the question as to when, under all the circumstances of the case, it is probable the iron would have been sold. If my recollection serves me right, No. 1 iron was worth from $54 to $58 a ton about the time it was received at the depot & it was somewhat lower during the year. No. 2 iron was worth from $52 to $54 per ton, at the time it was received at the depot. If you shall believe that the defendant was so direlect in his duty at the time he received this iron as to make him liable for it from the beginning, you would then be justified in giving a verdict for the full value of the iron at the time it was received; & if you shall believe that he was not direlect at that time, but was so afterwards, then you will be justified in averaging the price at the time when it would probably have been sold.

If you find that the plaintiff is indebted to the defendant, or if there is any balance due defendant for advances paid, you must take that into account, if you find that the bill for advances is correct, & deduct the amount of advances from the gross sum due plaintiff, if you find that there is anything due plaintiff from the proof.

To which charge to the jury in manner and form as aforesaid
77 the defendant then & there took no exception. After the jury

had returned a verdict, the defendant moved for a new trial, but the court overruled the motion; to which decision of the court the defendant then and there excepted, and the court ordered judgment to be entered upon the verdict.

And forasmuch as the foregoing facts do not appear of record, the defendant prays that this his bill of exceptions may be signed and sealed by the court, which is accordingly done.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed June 10th, 1870. W'm H. Bradley, clerk.

On this day, to wit, the 17th day of June, A. D. 1870, came said defendant, by his attorneys, and filed in said clerk's office his bond on appeal in said entitled cause, which said bond is in the words and figures following to wit:

Appeal bond.

Supreme Court of the United States.

ARTHUR B. MEEKER
vs.
JAMES LEE & JACOB STEVER. } In error.

78 Know all men by these presents that we, A. B. Meeker & James K. Burtis are held and firmly bound unto the above-named James Lee and Jacob Stever in the sum of five thousand dollars, to be paid to the said James Lee and Jacob Stever, their executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this seventeenth day of June in the year of our Lord one thousand eight hundred and seventy.

Whereas the above-named Arthur B. Meeker has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the northern district of Illinois, in a suit wherein the said James Lee and Jacob Stever were plaintiffs, and Arthur B Meeker was defendant:

Now, therefore, the condition of this obligation is such, that if the above-named Arthur B. Meeker shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then this obligation shall be void; otherwise the same shall be and
79 remain in full force and virtue.

A. B. MEEKER. [SEAL.]
JA'S K. BURTIS. [SEAL.]

Approved.

H. W. BLODGETT,
Dist. Judge.

(Endorsed:) Filed June 17, 1870. W'm H. Bradley, cl'k.

80 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the pro-

ceedings had in said court in said entitled cause, wherein said James Lee et al. are plaintiffs, and Arthur B. Meeker, is defendant, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Chicago, in said district, this tenth day of November, A. D. eighteen hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

[5-ct. int. rev. stamp affixed and canceled.]

81 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between James Lee and Jacob Stever, plaintiffs, and Arthur B. Meeker, defendant, a manifest error hath happened, to the great damage of the said Arthur B. Meeker, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

82 Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifteenth day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

83 UNITED STATES OF AMERICA, *ss:*

To James Lee and Jacob Stever, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Arthur B. Meeker is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 12th day of November, A. D. 1870.

H. W. BLODGETT, *Judge.*

84 (Indorsed:) Received copy of within this 12th day of November, A. D. 1870.

THOMPSON & BISHOP,
Attorneys of James Lee and Jacob Stever.

85 (Indorsed:) Circuit court U. S., northern dist. of Ills. James Lee and Arthur B. Meeker. Writ of error.

(Indorsement on cover:) No. 380. Arthur B. Meeker, plaintiff in error, vs. James Lee and Jacob Stever. N. Illinois C. C. U. S. Filed 10th December, 1870.

SUPREME COURT

OF THE UNITED STATES,

No. 380.

ARTHUR B. MEEKER, *Plaintiff in Error,*

vs.

JAMES LEE & JACOB STEVER, *Defendants.*

In error to the Circuit Court of the United States, for the Northern District of Illinois.

ARGUMENT OF PLAINTIFF IN ERROR.

STUMP & FROST, LAW PRINTERS, REYNOLD'S ARCADE.
1871.

Supreme Court of the United States.

ARTHUR B. MEEKER, *Plaintiff in Error,*

vs.

JAMES LEE & JACOB STEVER, *Defendants.*

In error to the Circuit Court of the United States, for the Northern District of Illinois.

Argument of Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiffs below, Messrs. Lee & Stever, were manufacturers of pig iron, at Massilon, Ohio. The defendant, Arthur B. Meeker, was a commission merchant, engaged in selling iron at Chicago, Illinois. In the summer of 1866, the plaintiffs shipped to defendant large quantities of iron to be by him sold for them on commission. The defendant sold, and from time to time rendered to the plaintiffs accounts of the sales of the iron so consigned to him, by them. The plaintiffs, however, claim that the defendant has failed to account for all the iron so consigned to him. That there is a deficiency of 92 tons. And they have brought this suit to recover the value of such deficiency.

A portion of the iron thus consigned to defendant, was shipped from Massilon to Cleveland, Ohio, by canal, and thence on vessels by the lakes to Chicago, while the residue was sent direct over the Pittsburgh, Fort Wayne and Chicago Railroad to Chicago. And of the 92 tons alleged to be unaccounted for by the defendant, six railway car loads arrived in Chicago, but did not come into the possession of the de-

fendant, and were lost. This loss the plaintiffs allege was in consequence of Meeker's negligence in not accepting and receiving this iron from the railroad company after being notified of its arrival. The defendant, however, insists, that this loss occurred not through his negligence, but through the laches of the railroad company, and that he is not responsible therefor. The residue of the 92 tons, after deducting the six car loads, it is alleged came into the possession of the defendant, but he has neglected to account for the same. The defendant, however, contends that such residue never came into his possession, and that he is not accountable therefor.

From the above statement it is apparent that this case naturally divides itself into two branches, and the inquiry presented is twofold.

First—As to that portion of the 92 tons contained in the six car loads, which never came into the possession of the defendant, and

Second—At to the residue of the 92 tons, (after deducting the weight of the six car loads) which it is alleged actually came into the possession of the defendant. We will dispass the case udder these two aspects or branches of it.

FIRST.

As to the iron contained in the six cars.

1. What was the quantity of iron contained in these six cars?

Of course, if the defendant is liable for the whole 92 tons, alleged to be missing and unaccounted for, it is immaterial how much the six cars contained. But if he should be found liable for this quantity, and not for the residue, then it becomes material to inquire how much the six cars contained. The jury

before whom the case was tried below, found for the plaintiffs the value of the whole 92 tons. But we claim that the jury erred in finding any verdict whatever for the plaintiffs under either branch of the case—and more especially under that branch of the case which relates to the residue, after deducting from the 92 tons the quantity contained in the six cars, and that the Court erred in not setting aside such verdict.

Now as to the quantity contained in the six cars, we remark, first, that there is no positive testimony upon this point.

J. K. Merwin, a witness on behalf of the plaintiffs, testifies as to the weight of the entire quantity of iron sent by the plaintiffs to the defendant—he also testifies to the numbers of these cars, and the respective dates of their shipments—but does not specify the weights of the six car loads, either severally or in the aggregate. (*Rec. ps. 27, 28*). The freight agent of the railroad company, *J. P. Brady*, testifies as to the six cars in dispute, and specifies their numbers, and the dates of their arrival in Chicago, respectively, but gives no account of the weights of their contents. (*Rec. p. 55.*)

The defendant speaks of them as containing sixty tons (*Rec. p. 50*). But it is manifest he could have no knowledge of the weight of these six car loads of iron; and it was doubtless an estimate of his, upon the hypothesis hat each car contained 10 tons. Perhaps that is the usual quantity for a car. The Judge in his charge to the jury, seems to have adopted the hypothesis of the defendant, that the six cars contained 60 tons, as he speaks of the residue, after deducting the contents of the six cars from 92 tons, as being 32 tons. (*Rec. p. 65.*) But there is no evidence that there was as much as 60 tons in these six cars. The near-

est we come to any positive testimony, and which we think should rule this point, is that of the plaintiff's witnesses, *J. P. Brady* and *Thomas Wight*. Brady, who is the freight agent of the R. R. Co., says that on the 1st of March, 1867, they stored it, (meaning the six car loads) with Wight & Dunton, who are storage merchants for several roads, (*Rec. p. 56*) and Thomas Wight testifies that his firm was Wight & Dunton, and that their business was storage and commission. That they received about the first of March, 1867, some iron from the Pittsburgh, Fort Wayne and Chicago Railroad Company. That he called on Mr. Meeker to see if he would take it on his yard, and give them warehouse receipts, subject to the settlement of the *difficulty*. That they only received between *forty and fifty tons*. (Rec. p. 62). Here we have the testimony of the freight agent that he delivered this iron (the six car loads) to Wight & Dunton; and we have the testimony of Mr. Wight, that all that his firm received was between forty and fifty tons, the average of which is 45 tons. This is the quantity and the only quantity that the testimony establishes, as contained in the six cars.

2. What was the value of this 45 tons?

The testimony is variant on this point. The jury found their verdict for the whole 92 tons. This verdict was for $3864 51. (*Rec p. 23*) having first deducted $1112.49, a balance standing to the credit of the defendant, for advances made on account of the plaintiffs. (*Rec. p. 54*) If we add, therefore, the balance standing to the credit of the defendant, to the verdict found against him, we shall find the total value of the 92 tons as ascertained by the jury, to wit: $4977, or about $54 10-100th per ton. At this rate the 45 tons would be valued at $2434.50, and if we deduct from this the balance standing to the credit of the

defendant as aforesaid, we have $1322.01, as the amount of the verdict the jury should have found, provided the defendant is only accountable for the 45 tons contained in the six cars. If those cars, however, contained 60 tons, the verdict still should have been only for $2133.51.

3. But thirdly, and lastly, under this branch of the case, remains the question whether the defendant, as the Factor of the plaintiffs, is guilty of that degree of negligence in not receiving from the Railroad Company, this consignment of the six car loads of iron, as to charge him with the consequences of the loss thereof?

What are the facts as detailed by the testimony? Upon the arrival of these car loads of iron, notice was sent to the defendant, by the railroad company, through a messenger boy, notifying the defendant of such arrival. (*Rec. ps. 40, 42, 46, 55, 56, 57, 58*) Upon receipt of this notice, the defendant directed the same messenger who brought the notice, to have the iron taken to the yard of the defendant, known as the Archer Road Yard. (*Rec. ps. 40, 46, 47.*) The iron was not taken to the yard as directed by the defendant, (*Rec. ps. 41, 48*) and after the lapse of four or five days after the notice of the arrival of the iron was given to the defendant, and the direction to have the same taken to the Archer Road Yard was given by him, the agent of the defendant went to the office of the Railroad Co. and inquired why the iron was not sent as directed, and he was informed there was a bill for demurrage against the iron, for delay in receiving it, which must first be paid before the iron could be touched. (*Rec. p. 41.*) This bill for demurrage was $150. (*Rec. p. 52.*) About four or five days after this, the same agent of the defendant went again for the iron, and offered to pay the freights upon it, but

the Railroad Co., refused to deliver the iron until this bill for demurrage was paid. (*Rec. ps. 41, 42, 48.*) The defendant then sent his teamster to haul away the iron, giving him a check upon a bank in Chicago, with which to pay the freights; he returned with the report that he could'nt get the iron. The defendant then sent up another man, and the report was that the iron had been thrown into the ditch. (*Rec. ps. 48, 44, 45*) The defendant thenceforth ceased his efforts to obtain the iron, except, as the defendant called the attention of the Superintendent of the R. R Co. to the matter, and he promised to have the thing looked up. (*Rec. p. 49.*) The iron remained upon the ground of the R. R. Co. until the 1st of March, when it was turned over by them to Wight & Dunton, storage merchants, who retained it until the 14th of September, 1868, when it was by them sold for the charges standing against it. (*Rec. p. 62.*) About three months after the arrival of the iron in Chicago, and the efforts to obtain it from the R. R. Co. without the payment of the $150 for demurrage had failed, the defendant, in personal conversation with Mr. Lee, one of the plain-plaintiffs, stated what he had done, and that he thought he had done his duty. (*Rec. p. 48, 49.*) Under this state of facts we contend that the defendant did all that the law required him to do, and for the following reasons:

(*a*) Upon being notified of the arrival of the iron, it was the duty of the defendant to designate the place of its delivery, accept it, and pay the freight upon it. He did designate the place of its delivery, and offered to pay the freight. But it is said that the R. R. Co. received no notice from the defendant as to where it should be delivered, because of the fault of the defendant in the manner of communicating such notice. The notice given by the defendant was communicated through the same channel, which the R. R. Co

employed to communicate to the defendant notice of the arrival of the iron, to wit: the messenger boy of the Co. The Judge charged the jury that "he did not think that for the purpose of carrying this message" (i. e. the message from the defendant to the R. R. Co.) this notice boy was the agent of the Railroad Company, but that he was for this purpose merely the agent of the defendant, and if he failed to deliver the message properly, the consequences of that failure are upon the defendant rather than upon the plaintiffs, who were in no way directly connected with it" In this particular of the charge we think the Judge erred—and by reason of it, we doubt not the jury found their verdict under this branch of the case for the plaintiffs. The messenger who brought to the defendant notice of the arrival of the iron, and through whom the defendant sent the direction to have the iron delivered at the Archer Road Yard, was the agent of the R. R. Co. It was the business of this boy, upon the arrival of freights, *to make out notices of their arrivals, and deliver them to the consignees.* The whole responsibility of this work is with this boy. (*Rec. p. 58.*) The notices are not made out *for* him, nor is *he sent* with them, but as the agent of the R. R. Co., he has the charge and responsibility of this business, and of his own motion, he from time to time performs this work. Can it be said that in the very matter of his agency, and in the very act of its performance he has no authority to receive responses to his notices that shall bind his principal? The rule as laid down by Justice Story in his treatise on Agency, is that "*notice of facts to an agent is constructive notice to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agencies; for upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal,*

having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undersigned, might operate most injuriously to the rights and interests of such party."

Story on Agencies, 7th Ed. Section 140.

Again, Paley in his Work on Agencies, says: "*If an agent come to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself.*

Dunlap's Paley on Agency, 4 Am. Ed. p. 262.

On this point we cite.

National Bank vs. Norton, 1 Hill, 578.
Fulton Bank vs. New York and Sharon.
Canal Co., 4, Page 127.
North River Bank vs. Aymar, 3 Hill, 274, 275.
Baggs vs. Lancaster Bank, 7 Watts & Serg, 331.
Susquehannah In's Co., vs. Perrine, 7 Watts & Serge, 348.
Bank of the United States vs. Davis, 2 Hill, 451, 463, 464.
Fitzherbert vs. Mather, 1 T. R. 12, 16.
McEwen vs. The Montgomery Co. Mut. In's Co., 5 Hill, 101.
Hovey vs. Blanchard, 13 N. H. 145.
Ross vs. Houston, 25 Miss. 591.
Distilled Spirits, 11 Wallace, 366.

Brady the freight agent of the R. R. Co., says, when testifying, that the messenger who delivers the notices of the arrival of the freights, has authority to bring back a notice *if it was written.* (*Rec. p. 58,*) and by this testimony conveyed the idea to the jury that in order to bind the R. R. Co., the defendant should have sent the notice, that he gave verbally to the boy, *in writing.*

What is there in this kind of notice that requires that it should be in writing? If a written notice would be binding, certainly a verbal one would be also. Nevertheless the impression was sought to be conveyed to the jury, that because the notice given by the defendant was not in writing, it was the same

as no notice at all. And for this purpose a blank notice was introduced in evidence by the plaintiffs, purporting to be a copy of the notice sent to the defendant, appended to which was a form of notice, or order to be filled up by the consignee and signed by him, directing the R. R. Co., to deliver the property consigned to the party named therein. The effect of the introduction of this testimony was to mislead the jury, as to the necessity of a *written* notice from the consignee to the R. R. Co., as to the delivery of the iron.

The introduction of this blank notice offered by the plaintiffs on the trial below, was objected to by the defendant's counsel, but the objection was overruled, and the defendant's counsel excepted to the ruling of the Court. (*Rec. p. 57.*) The blank notice was clearly inadmissible, the object of its introduction being to prove the contents of the original notice sent by the R. R. Co., to the defendant. The same could not be offered without first calling upon the defendant to produce the original, and his neglect or refusal so to do. We assign, therefore, as one of the errors of the Court, the introduction of this testimony without the foundation therefor being first laid. Again, notices had been sent to the R. R. Co., as to how and where to deliver the goods consigned, through the same messenger boy who had brought notices of the arrival of the goods, on previous occasions, and the R. R. Co., had acted upon them and delivered the goods accordingly. (*Rec. p's. 43, 47, 48.*) The R. R. Co., having itself expressly authorised this practise, they cannot now repudiate it.

But it is said supposing the notice to have been properly sent by the defendant, and duly received by the R. R. Co., still the iron would not have been delivered as directed by the defendant, because the freight upon the iron from Massilon to Chicago, and the expense of switching it over from the track of the Pitts-

burgh, Fort Wayne and Chicago Rail Road, via. the Chicago and Alton Rail Road track, to the Archer Road Yard, were not pre-paid. (*Rec. p. 58.*) A complete answer to this is the fact that this R. R. Co., had on previous occasions acted upon these directions without pre-payment of freight and switching charges, and had so given the defendant the right to presume and believe, they would do the same on this occassion. (*Rec. p's. 40, 41, 47, 68.*) If the R. R. Co., had on this occasion acted with the same promptness and fidelity as on former occasions, there would have been no delay of the cars in their yards, and no occasion for this bill for demurrage, which was the cause of the whole difficulty.

The defendant having performed his whole duty in reference to accepting and receiving the iron consigned to him, the charge for demurrage by the R. R. Co., was unreasonable and illegal, and the defendant was no more bound to pay it, than he would have been bound to pay any other unreasonable, illegal and extortionate demand, ten or twenty times as large. Neither was the defendant obligated to resort to legal proceedings to recover this iron, at his own expense. His business was to receive and sell the property consigned to him, on commission, and not involve himself in litigation over the property, nor was he obligated to resort to legal proceedings in order to recover this property from the R. R. Co. at the expense of his principals, relying upon them to reimburse him, without their express authority for so doing. It was doubtless his duty, when failing to obtain the iron, to communicate within a reasonable time, to his principals the circumstances attending it.

Did he do this? The evidence shows clearly that he did. One of the plaintiffs, Mr. Lee, testifies that in March following, he was advised of the condition of this property. (*Rec. p. 36.*) This was not an un-

reasonable time, for had the iron been in the possession of the defendant, he could not have sold it. The iron was slow of sale, and the defendant was until the November following closing out by sale, what he had already received. (*Rec. p. 50.*)

Again, in the month of February previous, the other plaintiff, Mr. Stever, as he testifies, (*Rec. p. 38-39*) was advised of the situation of this property; and the defendant testifies, (*Rec. p's 48, 49, 50, 52,*) that he thinks as early as in January, 1867, he communicated the facts in reference to the non-delivery of the iron, to the plaintiff, Mr. Lee. But the plaintiffs upon being thus advised took no steps themselves to recover their property, and gave no directions whatever to the defendant to do anything to recover the property. It would have been a very simple thing for them to have ordered the demurrage paid, or the iron to be replevied; but they did nothing. We fail to see, therefore, in any aspect of this case, that the defendant in any respect neglected the duty that he owed as their Factor to the plaintiffs. Had the property been his own he could have decided for himself, whether to pay the unreasonable, illegal and extortionate demand of the R. R. Co. for demurrage, or litigate with the Co. concerning it. But the property belonging to other parties, his duty was to report the facts to them, and leave them to act for themselves, or instruct him what to do on their behalf. The reason of the reluctance of the plaintiffs to act as against this R. R. Co. is disclosed by the defendant, when he testifies, that in answer to his suggestion to them to sue the R. R. Co. they replied "that it wouldn't do for them to sue—they were doing a large business at Massilon, and they wouldn't dare to sue—they (the R. R. Co.) would make it too hot for them—wouldn't give them cars." (*Rec. p's 50, 51.*) The plaintiffs doubtless thought it better in the long run to take the risk of

collecting the value of this iron from the defendant, even if they lost it, than to have a rupture with this R. R. Co.

We therefore dismiss this branch of the case under the full conviction that the defendant has performed every duty legally imposed upon him, in reference to the six car loads of iron that, it is conceded, never came into his possession.

SECOND.

We will next consider the second branch of this case, as to the residue of the iron, after deducting from the missing 92 tons, the amount contained in the six railroad cars.

The amount contained in the cars, having been found to be as above, 45 tons, the inquiry as to the residue, is an inquiry as to 47 tons. It is alleged that this 47 tons was not only shipped to, but actually came into the possession of the defendant: and in his accounts of sales, he is deficient as to this quantity. The defendant on the other hand insists, that he has fully accounted for all the iron that he received. To charge the defendant, therefore, with this missing 47 tons, it is incumbent upon the plaintiff to prove it into his possession. His contract is to sell the iron *committed to him*, for a commission, and render an account of his sales to the plaintiffs. And when he is sought to be charged with not having accounted for a given quantity, he must be proved affirmatively with having had the quantity committed to him. It is conceeded that he has accounted for all the iron committed to him, except the contents of the six cars, and the difference between that and the entire missing or unaccounted for quantity of 92 tons—which difference as above shown is 47 tons.

What evidence is there that Meeker, the defendant, ever received this 47 tons?

Is there anything more than an inference or presumption to this effect, raised by the testimony of Merwin, who testifies as to the total quantity of the iron shipped to the defendant? (*Rec. p. 27.*) We admit that such presumption is raised by such testimony. But after all, it is only a presumption, and may be balanced or overthrown by other testimony. This presumption is not confirmed or strengthened by any other testimony in this case. Merwin simply states that he knew of the shipment and consignment by the plaintiffs to the defendant of 763 tons of iron, (*Rec. p. 27,*) (which is the total amount sent by the plaintiffs to the defendant.) One of the plaintiff's Mr. Lee, testifies that the iron was weighed, shipped and billed by Merwin. (*Rec. p. 36.*) And there is no witness in this case, except Merwin, who ever weighed, or saw weighed any portion of the iron received by the defendant, and because he says he weighed and shipped 763 tons in all, the defendant is called upon to account for that precise number of tons. All has been accounted for but 47 tons, or about six per cent. of the whole amount. Now as to the presumption against the defendant, thus raised by Merwin's testimony, we remark, it may be *possibly* an erroneous presumption, as follows:

1st. Merwin may have made mistakes in weighing this large quantity of iron: weighing it, as he did, in installments, at different times, as he had occasion to send it by canal boats, or railroad cars.

2d. Merwin may have made mistakes in tallying or recording his weights.

3d. If accurately weighed and tallied by Merwin, and the amount correctly stated by him in his testimony, still it is possible that it may have been lost,

to the extent of six per cent. of the whole amount, on its way to Chicago; either from the canal boats, or in its transfer from the canal boats to vessels at Cleveland; or from the vessels on their voyage up the lakes; or in unloading from the vessels; or in its trans-shipment by the cars.

These things are possible, and yet the presumption remains against the defendant. They however prepare the way for the positive testimony of the defendant, which is as cogent as that of Merwin, and entirely overthrows the presumption of the former having received this missing quantity of 47 tons. There is also other testimony which estops the plaintiffs from insisting upon this presumption against the defendant.

1st. The defendant testifies distinctly that he "closed out the last of the plaintiffs' iron in November, 1867, about a year after the sixty tons"—(meaning the iron contained in the six railroad cars, which was 47 instead of 60 tons,) "was said to have arrived in the city. (*Rec. p. 50.*) Again he testifies, that he "rendered to the plaintiffs, several accounts of sales. The last one was on November 19th, 1867, the last sale was mentioned in that account of the iron I had on hand for the plaintiffs. The last account is the closing account of *all the iron we had for the plaintiffs.*" (*Rec p. 46.*) Now here is the positive testimony of the defendant, that he had accounted for all the iron he had for the plaintiffs. If he accounted for all he had, and he accounted for 47 tons less than was charged to him by Merwin, then Merwin must have made a mistake in his weights, or the iron was lost before it came to the defendant's hands. The defendant is unimpreached. He is as much entitled to credence as Merwin. At the most, Merwin's testimony only raised the presumption that the defendant received this 47 tons. The defendant has accounted for as many tons as is proved to have been sent, save 47, and says he has accounted for all he received, and if

his testimony is to be received at all, it is conclusive that he never received the missing 47 tons. Does not the testimony of the defendant overthrow the presumption raised by Merwin's testimony? Does it not at least balance it, and throw the burden upon the plaintiffs, by some other counterbalancing testimony to establish the reception of this missing quantity of iron in the hands of the defendant? The witness, Merwin, himself testifies, that his only means of knowing whether the iron arrived in Chicago, is said account of sales. (*Rec. p. 35.*)

2. The plaintiffs introduce in Merwin's testimony a letter from the defendant to the plaintiffs, which enclosed an account of sales No. 5. (*Rec. p. 39.*) In this letter defendant wrote as follows:

"*The last of your iron went last week. It was sold before, but we could not get cars to ship it. There is six cars of your iron yet in hands of R. R. Co., which they refused to deliver.*" Here is a distinct communication made by the defendant to the plaintiffs, that he had disposed of all their iron, except the six car loads; and in the communication is enclosed an account of sales of a certain quantity of iron, which, with the other accounts of sales previously rendered, showed the entire quantity of iron disposed of by the defendant. By adding this quantity to the contents of the six cars, (it being presumable that the plaintiffs knew how much was contained in the six cars, or if they did not, and they should allow the usual amount of ten tons to each car, which in this instance would be 15 tons more than the six cars actually contained,) the plaintiffs would see at once that there was a large deficiency in the accounts of the defendant compared with the amount they had charged as having been shipped to him. And the plaintiffs therefore upon the receipt of said letter of Nov. 19th, from the defendant must have concluded that they had made some mistake in

the weight of the iron sent to the defendant, or that it was lost before it reached him, and so waived the account against him. If such was not their conclusion, they were bound to speak at once, and notify the defendant that he was deficient in his account of the quantity of iron received by him, and afford him an opportunity to investigate the matter, and trace out the missing iron, if indeed he had ever received it. The plaintiffs never replied to the letter of the defendant, and never made any objection to the account so rendered by him. (*Rec. p's 45-6.*) The plaintiffs not offering to speak when allowed to do so, cannot now be allowed to speak when offering to do so. The probability is, that they concluded upon receipt of the letter of the 19th November, and the account of sales enclosed, that they had made a mistake in their weight of the iron sent to the defendant, or that the 47 tons was lost in its transhipment, and never came to the hands of the defendant, and they never would have offered to speak upon the subject, had it not been for the suit in reference to the six car loads. The doctrine of estoppel here applies, and there is no sufficient evidence in this case proving the reception by the defendant of this missing 47 tons of iron. And not having received it, he cannot be called upon to account for it.

We insist therefore that the plaintiffs were entitled to no verdict whatever at the hands of the jury, and especially, that if entitled to a verdict as to the six car loads of iron, they were entitled to none for the residue, after deducting the six car loads from the whole missing quantity of 92 tons, and to that extent, their verdict was too large by $2542.70, and that the Court erred in not setting aside the verdict as rendered, and granting a new trial.

CYRUS BENTLEY,

Attorney for Plaintiffs in Error.

JOHN F. FARNSWORTH,

Of Counsel.

Supreme Court of the United States.

ARTHUR B. MEEKER,
Plaintiff in error,
v.
JAMES LEE, ET AL.,
Defendants in error.
No. 176.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANTS IN ERROR.

BY F. H. KALES.

STICKNEY BROTHERS, PRINTERS, 40 PARK COURT.

Meeker was advised by letter of each shipment, and a bill of lading was sent to him on each shipment.

Meeker acknowledged the receipt of the iron, and charged Lee & Stever with the freights on all the iron. (*Trans.* 9 and 15.)

Meeker rendered accounts of sales for part of the iron, but did not account for ninety-two tons and 345 pounds, and Lee & Stever brought this action to recover the value of this iron not accounted for.

On the trial before Judge Blodgett and a Jury, no exception was taken to the charge of the Judge, or any part of it. (*Trans.* 27.)

The bill of exceptions professes to set out the whole evidence.

ADMISSION OF EVIDENCE.

A single ruling of the Court was excepted to. (*Trans.* 21.)

A blank notice proved to be the form which, filled out with name, date and number of cars, &c., was sent by the Railroad Company to Meeker, was admitted in evidence; and it is now claimed that this was error, on the ground that no notice is shown to have been given Meeker to produce the original.

Arg. Pltff. in Error, 9.

I.

It is a sufficient answer to this point, to say that no such objection was made on the trial. A general objection to the admission of the paper in evidence was made, but no particular ground of objection was specified.

"It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should

be permitted in an Appellate Court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured." * * * "We must consider objections of this character as vague and nugatory, and as if entitled to weight anywhere, certainly, as without weight before an Appellate Court."

Camden v. Doremus, 3 How., 515.

See, also,

Hinde's Lessee v. Longworth, 11 Wheat., 199.
Locke v. The United States, 2 *Cliff.*, 574.

II.

If any other answer to this point is needed, it may be said that the admission of this evidence could have caused no possible injury to the plaintiff in error.

Meeker admits receiving this notice, and says: "I received notice of the arrival of the iron from the office of the Pittsburgh & Fort Wayne Railroad Company, through a messenger. It was a printed form of notice with the number of the cars filled up." (*Trans.* 17.)

Olcott, a witness of Meeker, also testified that Meeker received the notice, and testified as to its substance. (*Trans.* 15–16.)

Meeker first introduced parol evidence as to the contents of this notice, and the admission in evidence of the blank form used, could have done no harm or injury to Meeker, and is no ground for reversing the judgment.

The admission of evidence which cannot have caused injury to the party complaining, is no ground for reversing a judgment.

Blackwell v. Patton, 7 Cranch, 471.
United States v. Wright, 1 McLean, 509.
Holbrook v. Nichol, et al., 36 Ill., 161.
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Greenleaf's Lessee v Birth 5 Pet. 132
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

This was an action brought by the defendants in error, Messrs. Lee & Stever, manufacturers of iron at Massillon, Ohio, against the plaintiff in error, Meeker, a commission merchant of Chicago, to recover the value of a quantity of pig iron, consigned by Lee & Stever to Meeker, for sale on commission.

Lee & Stever shipped to Meeker 763 tons of iron during the year 1866—603 tons No. 1, and 160 tons No. 2—(*Trans.* 9).

Meeker was advised by letter of each shipment, and a bill of lading was sent to him on each shipment.

Meeker acknowledged the receipt of the iron, and charged Lee & Stever with the freights on all the iron. (*Trans.* 9 and 15.)

Meeker rendered accounts of sales for part of the iron, but did not account for ninety-two tons and 345 pounds, and Lee & Stever brought this action to recover the value of this iron not accounted for.

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Watson et al. v. Campbell, 38 New York, 153.

Greenleaf's Lessee v Birth 5 Pet. 132
Phillips v Preston 5 How 288

INQUIRY AS TO THE GENERAL MERITS OF THE CASE.

A motion for a new trial was overruled, and judgment rendered on the verdict.

No error is complained of and presented to this Court in the manner required by the rules and practice of the Court; but the counsel for the plaintiff in error seeks to reverse this judgment upon an inquiry into the questions of fact properly submitted to and passed upon by the jury. In view of the repeated decisions of this Court and the practice of all Appellate Courts, it seems unnecessary to discuss the questions sought to be raised.

Lincoln v. Claflin, 7 Wall. 132.
Johnston v. Jones et al., 1 Black. 209.
Burr v. Des Moines R. & N. Co., 1 Wall. 99.
Johnson v. Moulton, 1 Scam. 532.
Alviso v. United States, 8 Wall. 340.

F. H. KALES,

of Counsel for Defendants in Error.